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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 534

LOUIS DABNEY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 340–353) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 29, 1946 (R. 353–354). On August 6, 1946, the time for filing a petition for a writ of certiorari was extended by the Chief Justice through September 27, 1946 (R. 357) and the petition was filed September 25, 1946. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence supports the jury's finding that the local board did not receive oral information from petitioner which it failed to reduce to writing.

2. Whether the denial of petitioner's claim to classification as a minister of religion has any basis in the evidence which was before the Director of Selective Service as the final classifying agency.

3. Whether the order to report for induction which was issued by the local board and signed by the board's clerk at the direction of the local board is invalid because the clerk's authority to sign the order was not recorded in the board's minute book.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act and of the Selective Service Regulations are set forth in the Appendix, *infra*, pp. 26–33.

STATEMENT

This is another aspect of the litigation which was before this Court in *Estep* v. *United States*, 327 U. S. 114. On March 18, 1946, after the de-

cision of this Court reversing petitioner's conviction for failing to report for induction, petitioner was re-indicted in the District Court for the Eastern District of South Carolina in one count charging that he wilfully refused to submit to induction as ordered by his local board, in violation of Section 11 of the Selective Training and Service Act of 1940 (R. 2). He was convicted after a trial by jury and was sentenced to imprisonment for three years and six months (R. 1).

At the trial it was stipulated "that on September 30, 1943, after undergoing the selective process and the screening process of the armed forces at the induction station, the defendant was accepted for training in [and] service in the United States Army, and was thereafter ordered to undergo the induction ceremony process, or, rather, the induction process ceremony. The defendant, Louis Dabney Smith, Jr., thereupon refused to submit to induction, and was thereafter released and charged with violation of the Selective Service Act of 1940" (R. 3–4). The sole disputed issue concerned the legality of the induction order and the underlying classification (1–A) given petitioner by the selective service agencies. The evidence adduced at the trial bearing on that issue may be summarized as follows:

On December 24, 1942, petitioner registered under the Selective Training and Service Act with Local Board No. 68, Columbia, South Carolina (R. 5, 118). In January 1943, he filed his

selective service questionnaire in which he stated, *inter alia,* that he was born on October 4, 192[illegible]; that he had been a student for the past year and one-half at the University of South Carolina, studying engineering; that he was working for a "B. S. Degree" and that he expected to take an examination for a license in engineering;[1] that from 1938 his occupation had been that of an ordained minister of religion;[2] that he was conscientiously opposed to both combatant and noncombatant military service; and that "in view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class 4D" (R. 6–7).

On February 8, 1943, petitioner filed Form 47, a form provided for registrants claiming exemption from military service as conscientious objectors. In that document (R. 119–122) petitioner stated that "I have consecrated myself to do the will of Almighty God, therefore I am a Christian, and being in covenant relationship with Almighty God, I cannot conscientiously bear arms or take part in any military movement because I believe to do so would be in violation of God's will * * *"; that his beliefs were founded on his study of the Bible under the direction of the

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[1] In summarizing his educational training, petitioner also stated that he had taken a "home study course for the ministry, 4 years" (R. 6).

[2] Petitioner described his ministerial activities as those shown "at Acts 20:20 and Luke 8:1 in the Bible" (R. 6).

Watchtower Bible and Tract Society; that "I have devoted on the average of 20 hours per week for the last four years studying and preaching the gospel of God's kingdom * * *"; that his "public expression" of his beliefs consisted of expressing "my own personal views" when questioned; that he was a student at the University of South Carolina; that he had been engaged in ministerial work from 1938 to date; that he became a member of the Jehovah's Witnesses sect in 1938 "by studying literature of Jehovah's Witnesses with the Bible"; that the "church, congregation, or meeting" which he customarily attended was "Kingdom Hall" and that "H. L. Crout (company servant)" was the leader or pastor of Kingdom Hall; and that the Jehovah's Witnesses sect has no official position in regard to participation in warfare and that it "leaves the matter entirely up to each individual to decide for himself."

In addition to these documents, petitioner filed two statements signed by numerous Jehovah's Witnesses stating that he was a minister of religion in the Jehovah's Witnesses sect (R. 124–125); a printed card issued by the Watchtower Society stating that he was ordained by God as a minister of Jehovah's Witnesses (R. 125–126); an occupational questionnaire stating that he was a student at the University of South Carolina studying engineering, that he was also "studying ministry at home," and that he had practiced the ministry since 1938 by going from "door to door

to the people" (R. 126–127); and a copy of an opinion of the Director of Selective Service concerning the circumstances in which Jehovah's Witnesses might be classified as ministers of religion (R. 127–130).

On April 2, 1943, the local board classified petitioner 1-A (R. 130). He immediately requested a personal appearance before the board and he was granted one on April 12. At that time petitioner appeared before the board and, according to his testimony, "I proceeded to show them from the scriptures and from the facts that I was a minister—from the notes I had.[3] They said, 'You have those things written down?' I said, 'Yes.' They said, 'You needn't quote scripture. Give us the notes [which petitioner had prepared in advance of the hearing], and we'll look them over.'" (R. 131.) On May 18, 1943, the local board classified petitioner 1–A–O, as a conscientious objector to combatant military service (R. 132).

Petitioner again requested a personal appearance before the local board and he was granted a hearing on May 25 (R. 132). At this hearing petitioner had access to his selective service file and he "went through this file," pointing out that he was claiming classification as a minister of religion (R. 132–134) and that he was attending college because his father "insisted" (R. 135). He testified that he told the board of his early

[3] The text of petitioner's notes is set forth at R. 152–155.

life and religious upbringing and he explained that his ministerial activity consisted of "calling upon people, announcing and pointing out the pending disaster coming upon the world—the battle of Armageddon—and that His Kingdom would be established on earth as it is in heaven, and that only those would be privileged who came into the Lord's organization and took a stand for Him in His Kingdom. To those persons interested, I left the printed Bible sermons, where they could sit in their homes and read those statements and see and learn the fulfillment of Bible prophecy, and that we are living in the last days now. If those persons showed an interest, I called back later" (R. 135–138). In addition, he told the board that he showed people upon whom he called how to use the Bible, and that he stood on street corners distributing printed sermons of the Watchtower and Consolation Magazines "for small contributions" or, if necessary, without payment; that he was an assistant to the presiding minister; and that he delivered "sermons," encouraging "a greater participation in the work of publicly preaching the gospel of the kingdom" (R. 138–139).

The local board advised petitioner that they would classify him in 1–A or 1–A–O (R. 141). Petitioner thereupon withdrew his claim to classification as a conscientious objector and he was therefore classified 1–A (R. 28–29). The local board chairman testified, concerning this hearing,

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that the board gave petitioner "as long a hearing as it was possible to give him" and that, in his view, none of the information in petitioner's selective service file showed that he was a minister of religion; that the evidence showed, instead, that he was a student studying engineering (R. 29).

On the same day, May 25, 1943, petitioner addressed a letter to the local board notifying it that he was appealing to the board of appeal and that he would assign the grounds for the appeal at a later time (R. 143). On the next day petitioner wrote a letter to the board of appeal setting forth his grounds of appeal as follows (R. 144–145):

> * * * I am basing my claim for reclassification on the fact that I am a minister and not a conscientious objector.
>
> 3. The only reason that I have not put my full time in Ministerial work is that my father requested that I go to college and I was under age and I obeyed his wishes. However, it is my intention at the completion of this semester to become a Pioneer and devote my full time to the work of the Ministry. * * *

The board of appeal classified petitioner 1–A and he then appealed to the President, the highest appellate authority in the Selective Service System (R. 145–146). On August 6, 1943, petitioner was notified that he had been classified 1–A on the appeal to the President (R. 146). Petitioner testified that he "immediately went out and se-

cured letters, affidavits, and petitions from ministers and other persons and from the Watch Tower Society, stating that I was an ordained minister of the gospel" (R. 146). Petitioner submitted these papers to the local board through the government appeal agent, who personally appeared before the board on September 7, 1943 (R. 147). The board declined to reopen the classification (R. 147). Petitioner requested and was granted a hearing on September 14, at which he summarized the evidence in support of his claim to classification as a minister of religion (R. 147–149). The board again declined to reopen the classification (R. 149). The minutes of the board recite that the board considered the newly submitted evidence, but that they unanimously declined to reopen the classification because the evidence was "merely a repetition of evidence already passed upon by this Board, by Board of Appeal No. 1 at Charleston, and by the President" (R. 151).

On September 18, 1943, petitioner was issued an order to report for induction on September 30. He reported but refused to submit to induction (R. 4).

In addition to the evidence summarized above concerning the proceedings before the selective service agencies, the trial court admitted *de novo* evidence concerning petitioner's status (see R. 91–105). H. L. Crout testified that he had been the presiding minister of the Columbia congre-

gation of Jehovah's Witnesses since 1930 (R. 73); that Jehovah's Witnesses are evangelists who preach the gospel from house to house and upon the streets (R. 74–75); that there were 75 members in the Columbia congregation, under his supervision (R. 75); that Jehovah's Witnesses are ordained by God and also receive a temporal evidence of their ordination from the Watch Tower Society (R. 80); that every Jehovah's Witness is a minister of religion, "a man or woman could not be a Jehovah's Witness unless he's a minister" (R. 82–83); that he had known petitioner since 1938 and petitioner had been actively engaged in preaching since that time (R. 76); that he had several assistants, including petitioner (R. 76); that in addition to being presiding minister of the Columbia congregation he operated a garage (R. 82); and that he was classified 4–D, as a minister (R. 82).

Petitioner's parents also testified in his behalf. His father testified, in substance, that he was opposed to petitioner's activities as a Jehovah's Witness and that it was at his insistence that petitioner studied engineering at the University of South Carolina (R. 63–64). Mrs. Smith testified that from early childhood petitioner had been trained in the faith of the Jehovah's Witnesses (R. 49–51). She said that petitioner attended the public schools and that, in addition, he attended two-hour classes twice weekly in the "Watch Tower Divinity School" (R. 51–52). In

1938, according to her testimony, when petitioner was fourteen years of age (R. 61), he became a minister by going "from house to house preaching the gospel of God's kingdom" (R. 52). On cross-examination Mrs. Smith testified, *inter alia,* that one becomes a minister by consecrating himself to God's will (R. 56) and that all Jehovah's Witnesses, including herself, are ministers (R. 60–61).

In submitting the case to the jury the trial judge instructed them, *inter alia,* that petitioner was entitled to an acquittal if the jury should find either that there was not substantial evidence before the Selective Service System supporting the denial of petitioner's claim to classification as a minister, or that, on the basis of all the evidence adduced at the trial, petitioner was a minister within the meaning of the Selective Training and Service Act (R. 268–271). The jury found petitioner guilty (R. 300).

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment was reversed (R. 353–354). The court remanded the case for a new trial because it concluded that the trial judge erred in permitting the jury to determine whether petitioner was a minister of religion and in instructing the jury that they might consider conscientious objection to participation in war as a factor in determining the credibility of the witnesses, including petitioner. (See R. 114, 287.)

ARGUMENT

Petitioner's sole contention in this Court is that the circuit court of appeals erred in remanding the case for a new trial, instead of ordering the indictment dismissed on the ground that the evidence at the trial conclusively demonstrated that his selective service classification was illegal. None of the three grounds upon which petitioner relies to show that his classification was illegal has, in our view, any merit.

1. *The record on the administrative appeal was complete in all respects.*—Petitioner contends (Pet. 21–26) that when he appeared before the local board on May 25, 1943, he submitted considerable oral information which the board failed to summarize in writing and place in his selective service file, and that, as a result, this information was not included in the record on his appeals to the board of appeal and the President. Since it is the duty of the local board to place in the registrant's selective service file a summary of any facts the board considers which do not appear in the written information in the file (Reg. 627.13 (a), *infra,* p. 32), petitioner urges that the local board departed from the Selective Service Regulations in his case. Basic to this contention is the question whether petitioner did in fact furnish new oral information to the local board at the May 25 hearing. We agree with the court below (R. 348–349) that this was a ques-

tion of fact for the jury and that the trial judge did not err in not directing a verdict for petitioner on this ground.

The only evidence purporting to show that petitioner orally furnished new information to the board at the hearing in question came from petitioner himself. He testified that when he appeared before the board on May 25, 1943, he went through the documents in his selective service file which he had previously offered in support of his claim to classification as a minister; that he discussed the scriptures with the board, pointing out that he had been ordained by both God and the Watchtower Bible and Tract Society; that he pointed out that after completing school, his "intention and purpose was to go in the ministry full time, but, because my father was not a Jehovah's Witness, he insisted that I go to college, and I went to college, and all the time I was going, I continued to perform—my time from September 1938 until I became a full time minister," and that the time devoted to his religious activities had increased from 30 hours each month to 80 hours; that he orally reviewed for the board his early training in the faith of the Jehovah's Witnesses sect and his desire to become a minister; and that he also told the board that he practiced the ministry by preaching from house to house (R. 132–141).

Mr. Britton, the chairman of the local board, testified concerning the May 25 hearing that the

local board had considered the evidence previously submitted by petitioner before he appeared at the hearing; that when petitioner came before the board they considered all that he had to say; that the board gave him "as long a hearing as it was possible to give him"; that in his opinion the information in petitioner's selective service file showed that petitioner was an engineering student, not a minister of religion; that he had no recollection of petitioner's telling the board that "he was going to quit college and go into the full time ministry work"; that the selective service file contained information submitted by petitioner to the effect that he was a minister of religion; that it also showed that he was a student in engineering at the University of South Carolina and that when he entered college, in answer to a question as to which religion he preferred, he stated in an application form, "none" (R. 28–32, 34–37).

In addition to the testimony of the local board chairman, there is strong circumstantial evidence which casts serious doubt on the veracity of petitioner's testimony concerning the May 25 hearing. Petitioner's present claim was advanced for the first time at the second trial of this case in March 1946, almost three years after the hearing in question, notwithstanding the fact that he had numerous opportunities to raise the issue at other times. On May 25, 1943, after the hearing, petitioner took an appeal to the board of

appeal and on the next day he submitted a statement asserting the grounds of his appeal, as was his right under Regulation 627.12 *infra*, p. 32. The present contention was not referred to in the statement.[4] When it is recalled that petitioner was before the local board at the hearing and had an opportunity to observe whether the board was making an effort to summarize in writing his alleged new oral information,[5] we

[4] Section 627.12, in contemplation of claims such as that which petitioner now makes, specifically provides that when a registrant takes an appeal he may attach to his questionnaire or notice of appeal a statement specifying, *inter alia*, "any information which was offered to the local board and which the local board failed or refused to include in the registrant's file." It was also petitioner's privilege under Section 605.32 of the Regulations to examine his selective service file to ascertain whether the information in question had been summarized and placed in the file. Since petitioner filed a statement on appeal, there can be no serious question that he was aware of these administrative remedies. However, by failing to specify the information which he now claims should have been included in his file, he failed to exhaust these remedies. See the *Estep* decision, 327 U. S. at 124–125, note 17. The answer of the court below (R. 349–350) to this argument, that Section 627.12 confers a privilege on the registrant but does not impose a duty on him, overlooks the fact that in most cases administrative remedies are matters of privilege. For example, a right to take an administrative appeal is a privilege. Yet it has never been doubted that a registrant who has not appealed from a local board classification has not exhausted his administrative remedies.

[5] If petitioner furnished the extensive verbal information to which he testified at the trial (R. 132–141) it should have been plain to him that unless a summary was prepared while he testified before the board an accurate one could not be prepared at a later date, for the hearing was a long one and petitioner claims that he furnished an extensive life history of his religious training and activities.

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think the failure of petitioner contemporaneously to assert his claim in his statement on appeal casts doubt upon his subsequent testimony at the trial. This doubt is intensified by the circumstance that petitioner made no claim at the trial that the alleged irregularity was newly discovered. Further doubt arises from the fact that when petitioner requested the local board to reopen his classification after his final unsuccessful appeal to the President, he again failed to advert in any way to the alleged irregularity. While he now urges (Pet. 23–24) that his classification should have been reopened to cure the irregularity, there is nothing in either of his requests to reopen of September 7 and September 14, 1943, which even suggested that he had furnished oral information to the local board which had not been summarized in writing and placed in his file (see R. 146–149, 309–333).[6]

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[6] The local board had power to reopen the classification only if it determined that new facts were presented which, if true, would require a reclassification (Reg. 626.2 (a), *infra*, p. 31). The board twice considered requests to reopen petitioner's classification and on both occasions it concluded that the new matter presented was merely repetitious of the information which had been placed before the board prior to his classification. Having so found, the board, of course, lacked power to reopen the classification. Even if it be assumed, *arguendo*, that the board erred in its finding that the new matter was merely cumulative, its conclusion was reached in conformity with the requirements of section 626.2, and there is no showing that the board did not honestly exercise its discretion. In these circumstances the board's determination is unassailable. "The decisions of the local boards

There is no evidence that at any time from May 25, 1943, until the date of his second trial in March 1946, petitioner ever advised any agency of the Selective Service System of his present claim. In addition to these circumstances, the trial judge, in considering whether to direct a verdict for petitioner, was free to take judicial notice of an earlier habeas corpus proceeding in the same court (*Smith* v. *Richart,* 53 F. Supp. 582 (E. D. S. C.), where petitioner challenged the legality of his selective service classification on various grounds, none of which included his present claim.

When viewed in this context, petitioner's unsupported testimony did not, we believe, require the trial judge to take the issue from the jury. Instead, as the court below concluded, these "questions of fact were for the jury and it was for them to decide whether the defendant actually gave additional facts which were not included in the record" (R. 349). The question was fully argued to the jury by petitioner's counsel (see R. 221–226), and the trial judge carefully instructed the jury that if they should find that the local board failed to reduce to writing any material facts orally presented by petitioner at the May 25 hearing, he was entitled to a verdict of

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made in conformity with the regulations are final even though they may be erroneous." *Estep* v. *United States*, 327 U. S. at 122. See also *Cramer* v. *France*, 148 F. 2d 801, 804 (C. C. A. 9); *United States* v. *Commanding Officer*, 142 F. 2d 381, 382 (C. C. A. 2).

acquittal (R. 241–242, 271, 274–276). In the light of these circumstances, the conclusion must be that the jury, with reason, resolved the issue of credibility against petitioner.

In any event, as the circuit court of appeals observed (R. 349), this question concerning the May 25th hearing can be fully explored on the retrial of the case through the testimony not only of petitioner, but also of the members of the local board and the government appeal agent who were present at the hearing. If petitioner's story is true, it undoubtedly will find support in the testimony of these persons.

2. *There was ample factual basis for petitioner's classification.*—As a second ground for urging that the court below should have remanded the case with directions to dismiss the indictment, petitioner urges (Pet. 27–35) that the denial of his claim to exemption from service as a minister of religion is contrary to the undisputed facts before the Director of Selective Service when he finally classified petitioner on the appeal to the President. We agree with petitioner that the judicial inquiry must be limited to the facts of record before the final classifying agency. Accordingly, the evidence which was adduced *de novo* at the trial (*supra,* pp. 9–11) is not pertinent to the present discussion.

To demonstrate to his board that he is an ordained minister of religion, as he contends, petitioner had the burden of showing that he was

ordained by his sect and that he customarily teaches and preaches the tenets of the sect and administers its rights and ceremonies in public worship (Reg. 622.44 (c), *infra*, p. 28). As the court below notes (R. 345–346), in applying this provision to members of the Jehovah's Witnesses sect, the Director of Selective Service has instructed the local boards as follows:

> Whether an official of the Jehovah's Witnesses group stands in the same relationship to this group as a regular or duly ordained minister in other religions must be determined in each individual case based upon whether he devotes his life in the furtherance of the beliefs of Jehovah's Witnesses, whether he performs functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether he is regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.[7]

It is clear, therefore, that the Selective Service System has recognized that the religious leaders of the Jehovah's Witnesses sect are entitled to exemption from service under the act just as are the leaders of any other religious group. It is equally clear, however, that the Selective Service

[7] These instructions were originally embodied in Opinion No. 14 of the Director of Selective Service and are presently contained in State Director Advice No. 213–B, issued by the Director on June 7, 1944.

Regulations, particularly as construed by State Director's Advice No. 213–B, do not contemplate that every member of the Jehovah's Witnesses sect should be exempted from service. Instead, the legislative standard, as implemented by the administrative regulations and interpretations, contemplates that only those Jehovah's Witnesses who stand in the same relative position in their group as do recognized ministers of other religious denominations are entitled to be classified as ministers of religion.

The question at issue is whether there is any evidence in petitioner's selective service file which supports the Director's final determination that petitioner had not shown himself to be entitled to classification as a minister of religion. The information before the Director, summarized in the Statement, *supra,* pp. 3–9, shows that petitioner, a boy of 18, was, at least until after he was classified 1–A, a student in engineering at the University of South Carolina, and that he intended to complete his course and enter the engineering profession. He joined the Jehovah's Witnesses sect in 1938 and he claimed that he became a minister in the sect in the same year, when he was 14 years old. His religious activities from 1938 through 1942 consisted of devoting an average of 20 hours each week to "studying and preaching" the tenets of his sect. Some of this time he spent in going from "door to door to the people." Petitioner advised the local board

that his minister of religion in the Jehovah's Witnesses sect was one H. L. Crout. The only information in the administrative record, as it was when petitioner was finally classified by the Director, concerning petitioner's plans for the future is found in his statement on appeal to the board of appeal, where he said that he intended to complete the present semester at college and then to devote "my full time to the ministry." There was no evidence before the Director showing that petitioner had actually withdrawn from college or that he was in fact devoting his full time to religious activities.

Contrary to petitioner's argument, we think these facts failed utterly to show that petitioner stands in the same relationship to the Columbia, South Carolina, unit of Jehovah's Witnesses, with which he is affiliated, as do ministers of other religious faiths to their congregations. Indeed, it affirmatively appears from the information supplied by petitioner that he regards one H. L. Crout as his minister or religious leader.[8] Most of petitioner's time and effort was spent in studying engineering, not in preaching and teaching the tenets of his religion and performing the usual functions of the average minister of religion. Petitioner's evidence, even when considered in the light most favorable to him, shows only that, like all other Jehovah's Witnesses, he practices

[8] Crout had been classified IV–D as a minister of religion (*supra*, p. 10).

his religious beliefs by witnessing from house to house and on the streets, in his case for an average of 20 hours each week. In our view, such evidence does not demonstrate that there was no foundation in fact for the Director's refusal to classify petitioner in 4–D.[9] To the contrary, we think the court below was clearly correct in holding (R. 345) that there was substantial ground for denying petitioner's claim to exemption. See also *Smith* v. *Richart,* 53 F. Supp. 582 (E. D. S. C.), and *Smith* v. *United States,* 148 F. 2d 288 (C. C. A. 4), reversed on another ground, 327 U. S. 114, where the facts in petitioner's case are considered and where the same conclusion is reached; *Sunal* v. *Large,* decided July 29, 1946 (C. C. A. 4), pending on petition for a writ of certiorari, No. 535, this Term, and cases collected in that opinion.

[9] Petitioner urges (Pet. 28) that his case is the same on its facts as *United States* v. *Stalter,* 151 F. 2d 633 (C. C. A. 7), where the court concluded that the registrant was improperly denied classification in 4–D. We think that decision is open to serious question, since it nowhere appeared from the facts that the registrant stood in the same relationship to other Jehovah's Witnesses as does a minister in other religious sects to his congregation. Significantly, however, the court there disagreed with petitioner's view advanced here that all Jehovah's Witnesses are ministers and are thus exempt from military service (151 F. 2d, at 637). The court found, however, that the petitioner in that case devoted his "full time to ministerial work" and that he therefore should have been classified as a minister. The case is therefore clearly distinguished from that at bar.

3. *The Board's clerk was authorized to sign its order to report for induction.*—Petitioner also urges (Pet. 36–38) that his induction order was void as a matter of law because it was signed by the clerk of the local board. His argument is that under Section 603.59 of the Selective Service Regulations, *infra,* p. 27, the clerk may sign official papers only "if he is authorized to do so by a resolution duly adopted by and entered in the minutes of such local board," and that since the minutes of the local board do not reflect such a resolution, the induction order lacked validity.

It is not disputed that petitioner was classified 1–A, or that the local board, acting as a board, determined that petitioner should be ordered to report for induction on September 30, 1943, or even that the induction order was issued as the order of the board and was signed by the clerk at the direction of the board. Likewise, there is no question that petitioner's refusal to submit to induction was not attributable in any respect to the fact that the clerk signed the induction order as the agent of the board.

The chairman of the local board testified at the trial that at the inception of the local board's activities they authorized their clerk to sign induction orders for the board (R. 16–17). The resolution authorizing the clerk to do this was not entered in a minute book because "the government when it first set up Selective Service

did not give us minute books, and in the early stages of the Selective Service Act, we did not keep minutes of all our board meetings" (R. 15–16). Thus, the sole basis for petitioner's contention is the failure of the local board to record its resolution in a minute book. Clearly, the local board's failure to comply with this directory administrative detail in the performance of its duties is not a matter of sufficient substance to vitiate its jurisdiction to order petitioner to report for induction. It can hardly be said that the failure of the board to make a proper entry, which in no way related specifically to petitioner or prejudiced him affected the jurisdiction of the board. A contrary conclusion would mean that the board lacked jurisdiction to order for induction the thousands of men who were inducted from that board. But as the Second Circuit said in *United States* v. *Drum,* 107 F. 2d 897, 900–901, certiorari denied, 310 U. S. 648—

> A clerical error [involving a departure from the Selective Service Regulations] committed by the local Draft Board—civilians volunteering for the service without special training therefor—should not be held to throw the machinery of the draft out of commission when it worked no perceivable prejudice to the rights of any one.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1946.

APPENDIX

The Selective Training and Service Act of 1940, 54 Stat. 885, as amended (50 U. S. C. Appendix 301–318) provided in part as follows:

SEC. 5 * * *

(d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

* * * * *

SEC. 10 (a). The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provision of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. * * * Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with re-

spect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe * * *.

* * * * *

SEC. 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

The pertinent Selective Service Regulations provide as follows:

603.59 *Signing official papers.*—Official papers issued by a local board may be signed by the clerk "by direction of the local board" if he is authorized to do so by a resolution duly adopted by and entered in the minutes of such local board, provided that the chairman or a member of a local board must sign a particular paper when specifically required to do so by the provisions of a regulation or by an instruction issued by the Director of Selective Service (6 F. R. 6828).

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622.44 *Class IV–D: Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant who is a

regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties (6 F. R. 6610).

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623.2 *Information considered for classification.*—The registrant's classification shall be made solely on the basis of the Selective Service Questionnaire (Form 40), Affidavit of Dependent Over 18 Years of Age (Form 40A), Affidavit—Occupational Classification (General) (Form 42), or Affidavit—Occupational Classification (Industrial) (Form 42A), and such other written information as may be contained in his file. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the

local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file. (7 F. R. 9607.)

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625.1 *Opportunity to appear in person.*—(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

(b) No person other than the registrant may request an opportunity to appear in person before the local board. (6 F. R. 6843.)

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625.2 *Appearance before local board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the proper place on the Classification Record (Form 100). If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. No registrant may be represented before the local board by an attorney.

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified: *Provided,* That if he has been physically examined by the examining physician, the Report of Physical Examination and Induction (Form 221) already in his file shall be used in case his physical or mental condition must be determined in order to complete his classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again

classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification. (6 F. R. 6843; 7 F. R. 9607.)

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626.2 *When registrant's classification may be reopened and considered anew.*—(a) The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

(b) At any time before the induction of a registrant, the local board shall reopen and consider anew such registrant's classification upon the written request of the State Director of Selective Service or the

Director of Selective Service. (7 F. R. 110, 653, 2089.)

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627.12 *Statement of person appealing.*— The person appealing may attach to his notice of appeal or to the Selective Service Questionnaire (Form 40) a statement specifying the respects in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file. (6 F. R. 6845.)

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627.13 *Local board to transmit record to the State Director of Selective Service.*— (a) Immediately upon an appeal being taken to the board of appeal, the local board shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken and the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts. In preparing such a summary the local board should be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision. (7 F. R. 2090.)

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